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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 495

THOMAS E. HAYES, et al., on Behalf of Himself and All Others Similarly Situated,

Petitioners,

vs.

UNION PACIFIC RAILROAD CO. (a corporation) and DINING CAR EMPLOYEES UNION LOCAL 372 (a voluntary unincorporated labor organization); and JAMES G. BARKDOLL, as District Director of said Local 372 in the District of Los Angeles, State of California,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Thomas E. Hayes and those named with him as parties plaintiff and appellant in the Courts below respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause (R. 192), together with the order of the said Court denying a rehearing (R. 193), which decisions affirmed the decision of the District Court of the United States for the Northern District of California, Southern Division. (R. 136, 163, 164.)

OPINIONS BELOW.

The opinion of the District Court is reported at 88 F.S. 108; the order denying petitioners' motion for leave to file an amended complaint and set aside the order of dismissal (R. 163, 164) is not reported. The opinion of the Court of Appeals is reported at 184 F. (2d) 337. The decision of the Court of Appeals denying rehearing is not reported.

JURISDICTION.

The judgment of the Court of Appeals was entered August 30, 1950. The order of the Court denying re-

hearing was entered October 20, 1950. Jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1541 (1).

STATUTE INVOLVED.

Railway Labor Act, Section 2, 45 U.S.C.A. Section 152, Fourth, provides as follows:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, that nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or

local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

QUESTIONS PRESENTED.

1. Where discrimination in seniority, wages and working conditions is practiced against Negro members of a craft or class of railroad employees by reason of their race or color, by the sole collective bargaining representative of the class under the Railway Labor Act, and by the railroad, under the terms of a collective bargaining agreement which does not expressly provide for, but which by its terms permits the discriminatory practices of the union and the railroad, is exhaustion of administrative remedies before the National Railroad Adjustment Board a jurisdictional prerequisite to the granting of relief by the courts?

2. Do unions acting as sole bargaining agents under the Railway Labor Act have a duty imposed by the Act to protect all members of the class represented in the *performance* of collective bargaining agreements against race discrimination by the railroad? If this question is answered in the affirmative, may railroads knowingly participate in discriminatory performance of the collective bargaining agreement?

A third question not relied upon for the granting of the writ, but which petitioner wishes to preserve for possible presentation if the writ is granted is as follows:

3. Is due process of law afforded an appellant who appeals from a decision of the Presiding Judge of a United States District Court to a United States Court of Appeals, where the panel of the Court of Appeals which hears and decides the case, is composed of one judge of the Court of Appeals, and two judges of the District Court from which appeal is taken?

STATEMENT OF THE CASE.

This case comes before this court on affirmance by the Court of Appeals (R. 191) of an order of the District Court dismissing the complaint for lack of jurisdiction (R. 143), and denying a motion for leave to file an amended complaint. (R. 163, 164.) The judgment of the District Court makes clear, however, that the proposed amended complaint was considered by the Court before entering the judgment of dismissal. (R. 163, 165.)

The complaint alleged that plaintiffs below, petitioners here, are Negro members of a craft or class of Railroad employees, dining car workers, represented by the respondent union, Dining Car Employees Local 372, in collective bargaining with respondent railroad, the Union Pacific Railroad Company. (R. 4, 5.) It alleged that under a collective bar-

gaining agreement entered into by the two respondents (R. 5), Negro employees of the railroad here, upon their initial employment, were assigned seniority in a certain Group, designated Group B, solely by reason of their color, while white employees similarly assigned were always placed initially in a higher Group, designated Group A, solely because they were white. (R. 5, 6.)

It was not alleged, and it is not the case, that the collective bargaining agreement *required* this discrimination by its terms. It merely set up the two seniority Groups, with others not material here, and provided of the assignment of new employees to a group, for seniority purposes, in the Group and Class designated by the Railroad. (R. 5.)

This discrimination resulted, it was alleged, in materially larger pay and allowances for white than for Negro employees (R. 6), and, taken together with the provision of the collective bargaining agreement setting forth the method of acquiring seniority in higher Groups or Classes resulted in a permanent discrimination in favor of white employees. (R. 6, 7.)

The respondent Union is alleged to have connived with the respondent Railroad in these practices (R. 5, 6, 7), and both respondents are alleged to have refused, in spite of protest by petitioners and their representatives, to refrain from this discrimination. (R. 8, 9.)

It was alleged that the only administrative remedy available to petitioners was before such bodies of the

Union and the Railroad as had already acquiesced in the perpetuation of these practices. Plaintiffs sought an injunction, damages and a declaration that these practices are unlawful.

On motion of the respondent Union (R. 32), and respondent Railroad (R. 38), this complaint was ordered dismissed on January 19, 1950, but, before the order of dismissal was signed and filed (R. 163), petitioners filed a motion for leave to file an amended complaint. (R. 144.) This complaint was considered by the District Court along with affidavits not material to the question petitioners present here, and with oral argument of Counsel. The judgment of dismissal made and filed February 13, 1950 (R. 163, 164), was on the grounds that there was no issue as to any material fact, and that the defendants were entitled to a judgment of dismissal as a matter of law. This referred to the rule expressed in the opinion of January 19, 1950 (R. 136), that the Railway Labor Act imposes no duty on a collective bargaining agent not to discriminate on the basis of race, except with respect to collective bargaining and the making of contracts (R. 141), and that, since the complaint failed to allege that the contract was *per se* discriminatory (R. 140), the Court was without jurisdiction to entertain the case. (R. 143, 144.)

The proposed amended complaint alleged, in a first cause of action all the material in the original complaint, as set forth above (R. 145-154.)[1] In a second

[1]Some allegations of the original complaint not discussed and not material here were omitted or changed in the first cause of action of the amended complaint.

cause of action, the complaint alleged that the respondents Union and Railroad, conspired together to discriminate against Negro employees in the Dining Car Department by arbitrarily assigning them to seniority Group B and Classes IV and V and white employees to Group A and Classes II and III. (R. 154.) It was alleged that, by reason of this discrimination, the pay of the Negroes was less than that of the white employees. (R. 155.) It was further alleged that the collective bargaining agreement provided no mode of determining to which Group or Class new employees should be assigned, but that it was the existing practice, which the Railroad and Union verbally agreed to continue, to assign whites to Group A and Negroes to Group B. (R. 155, 156.) It was also alleged (R. 155), that the collective bargaining agreement, as modified by this verbal agreement, was discriminatory and in violation of the Railway Labor Act.

It was further alleged in the second cause of action (R. 157) that, by reason of this discrimination, the petitioners can never overcome the initial handicap imposed upon them because they can accumulate seniority in higher Groups or Classes only from the date of their assignment therein.

Plainly put the situation is this:

A Negro and a white employee hired on the same day and possessing the same qualifications can never have the same seniority since the initial seniority classification is made on the basis of race alone, and places the white man in the higher Class or Group.

REASONS FOR GRANTING THE WRIT.

1. **The decision below is in conflict with the applicable decisions of this Court in two respects:**

(a) It holds that petitioners must exhaust their administrative remedies before the Railroad Adjustment Board before the federal courts can grant relief.

(b) It holds that the Railway Labor Act imposes no duty on collective bargaining agents under the Act to protect minority members of the represented class in the performance of collective bargaining agreements.

(a)

The Court of Appeals adopted the opinion of the trial Court and added to it the following language:

> "We add to it only to the extent of saying that it is clear to us that the Federal Courts are not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate tribunals have been established for that purpose. 45 USC § 153, National Railroad Adjustment Board; Slocum v. D. L. & W. R. Co., 339 U. S. 239. It is only when collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect, that federal courts may act. This is made quite clear by the Supreme Court in Steele v. L. & N. R. Co., 323 U. S. 192,

> and Tunstall v. Brotherhood, 323 U. S. 210. The disposition of the cause made by the District Court is correct." (R. 190-191.)

There appears to be no room for any doubt that this Court in *Slocum v. Delaware, L. & W. R. Co.* excepted from the operation of that opinion the situation presented here, where the petitioners are minority members of a class represented by the respondent Union, and complaining of discrimination by that respondent. This Court in Footnote 7 to the majority opinion in the *Slocum* case said:

> "We are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative as in Steele v. Louisville & N. R. Co., 323 U. S. 192, 89 L. Ed. 173, 65 S. Ct. 226 * * *"

The situation in the *Slocum* case was completely unlike the situation in this case, and, as this Court pointed out in the *Slocum* case, that was a case where the appropriate tribunal was the Adjustment Board.

The *Steele* and *Tunstall* cases have been construed by numerous state courts. In each of those, the *Steele* and *Tunstall* decisions were construed to give courts jurisdiction to grant relief against discrimination by the collective bargaining representative of a minority without exhaustion of administrative remedies.

In *Crowell v. Palmer,* 134 Conn. 502, 58 Atl. (2d) 729, the Supreme Court of Errors of Connecticut in 1948 considered an action by non-members of a railroad union, which was the sole bargaining agent for

the class in which the plaintiffs belonged, for injunctive relief against discrimination practiced by the union and the railroad company in the distribution of overtime work. In that case the plaintiffs had started a proceeding before the Railway Adjustment Board but had been unable to secure a hearing. The Court below granted a non-suit on the ground that they must exhaust their administrative remedy before the Board. The Supreme Court of Errors reversed, holding that the plaintiffs in that case had no administrative remedy and that the jurisdiction of the Court to grant relief was untouched by the Railway Labor Act.

In *Betts v. Easley,* 161 Kan. 459, 169 Pac. (2d) 831, the Supreme Court of Kansas in 1946 had before it a suit for injunction by Negro railway workers who sought to prevent discrimination by the union representing them and the railroad. The Kansas Court held it had jurisdiction although there had been no resort to the Railroad Adjustment Board.

In *Edelstein v. Duluth M. & I. RR. Co.,* 225 Minn. 519, 31 N.W. (2d) 465, the Supreme Court of Minnesota held that the courts have jurisdiction, even though administrative remedies under the Railway Labor Act were not exhausted, to hear a suit for back pay for discharge in violation of the seniority rights set up under the collective bargaining agreement.

In *Griffin v. Gulf & Ship Isle R. Co.,* 198 Miss. 458, 21 So. (2d) 816, the Supreme Court of Mississippi in 1945 heard an appeal from a decree sustaining a demurrer and dismissing the complaint of Negro fire-

men who sought to restrain the railroad from putting into effect an award of the Railroad Adjustment Board. The gravamen of the plaintiffs' complaint was that the award denied plaintiffs their seniority rights under a collective bargaining agreement. The award of the Adjustment Board had been obtained by the union and the railroad without disclosing to the Board the discriminatory effect it would have. The Mississippi Court held that the award was not *res judicata* and not binding upon the plaintiffs in that case because they had never been before the Board. The decision below was reversed. This was clearly a decision that plaintiffs who had not exhausted their remedies before the Board, since they had never been before the Board, could appeal to the Court for relief.

Compare *State ex rel. St. Louis-San Francisco Ry. v. Russell,* 356 Mo. 975, 219 S.W. (2d) 340, where the Supreme Court of Missouri held that the *Steele* and *Tunstall* rules did not apply when the dispute was between Negro train porters, represented by their own collective bargaining agent, and the railroad, over the elimination of jobs formerly filled by the petitioners, and their assignment to members of other collective bargaining agents. See also *Washington Terminal v. Boswell,* 124 F. (2d) 235, and *Edwards v. Capitol Air Lines,* 176 F. (2d) 755, the latter case holding that the award of a mediation board set up under the Railway Labor Act in a dispute between a minority represented by the union whose interests were in conflict with the interests of the majority, and the railroad, was judicially reviewable despite the contract lan-

guage making such awards final and binding, because where the minority was represented in proceedings by the union it could not be presumed that it got a fair hearing.

(b)

Although both Courts below relied upon the decisions of this Court in the *Steele* and *Tunstall* cases (R. 137, 191), there appears to be a direct conflict between the *Steele* and *Tunstall* decisions and the decision of the Court of Appeals.

The District Court here held that the Railway Labor Act imposed upon the collective bargaining agent alone a duty not to discriminate, and that this duty was "only with respect to collective bargaining and the making of contracts." (R. 141.) Since the complaint did not allege that the contract as drawn was discriminatory, but that only the *conduct* of the parties discriminated against the plaintiffs, the district judge held that the complaint alleged no violation of the duty imposed by the Railway Labor Act. (R. 141.)

The Court of Appeals adopted the opinion of the district judge, saying,

> "We add to it only to the extent of saying that it is clear to us that the federal courts are not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. Congress did not, by the Railway Labor Act, grant jurisdiction

to the federal courts to afford relief for breaches of performance of collective bargaining agreements."

This interpretation of the decisions of this Court in the *Steele* and *Tunstall* cases appears to be completely inconsistent with the decisions, and unsupported by any language appearing therein. In the first paragraph of the opinion Mr. Chief Justice Stone stated the question as follows:

> "The question is whether the Railway Labor Act imposes on a labor organization acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees the duty to represent all the employees in the craft without discrimination because of their race and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation." (323 U.S. 193, 194, 89 L.Ed. at 178.)

In summary, the Court stated its decision in the following language:

> "We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses *the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to fairly exercise the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them.*" (323 U.S. at 202, 89 L.Ed. at 183.) (Italics supplied.)

No language supporting the interpretation of the Court of Appeals is cited by that Court in its opinion.

No such language appears in the decisions of this Court. Is the proposition, that the collective bargaining agent owes no duty to protect minority members of the class it represents in the *performance* of collective bargaining agreements, consistent with the proposition that the Railway Labor Act expresses the aim of Congress to impose on the bargaining representative the duty to *fairly exercise the power conferred upon it* on behalf of all those whom it represents, without hostile discrimination against them? The answer to this question is evident when it is considered that if its duty is confined to the formation of contracts by refraining from stating in the collective bargaining agreement a discriminatory purpose, the duty of the bargaining agent could be completely avoided.

The opinion of the Court of Appeals appears to be another example of the not unfamiliar practice of narrowing a broad and socially constructive decision by this Court and construing it as a mere restatement of well accepted principles.[2]

Certain of the cases decided by State Supreme Courts discussed above interpreted the *Steele* and *Tunstall* cases in a wholly different light. In *Griffin v. Gulf and Ship Isle R. Co.*, supra, the Supreme Court of Mississippi held that the Brotherhood had breached its duty to represent minorities within its craft or class when it failed to disclose to the Rail-

[2]See Judge Roche's characterization of a portion of the *Steele* and *Tunstall* rulings as "* * * simply the statement of an elementary principle of contract law." (R. 140-141.)

road Adjustment Board the discriminatory effect of an award which it sought. The Supreme Court of Errors of Connecticut in *Crowell v. Palmer,* supra, entertained a suit for injunctive relief where the plaintiffs were not members of their sole bargaining agent and where they complained of a breach of the collective bargaining agreement in the assignment of overtime work.

In this case the Railroad and the Union wrote a collective bargaining agreement which did not directly require discrimination for its performance. The contract did, nevertheless, lay the basis for the discrimination that was practiced when it set up seniority groups, and provided for assignment of new employees to one of those groups *without stating any basis upon which the group was to be chosen.* Petitioners here do not agree that such a contract is a non-discriminatory contract. Nevertheless, assuming that it is correct to characterize it as a non-discriminatory contract, it affords a perfect example of the method by which the duty imposed by the Railway Labor Act upon collective bargaining agents may be avoided if the decision of the Court of Appeals is correct. Performance of the contract is completely consistent with discrimination. So long as a new employee is assigned to one of the seniority groups the contract obligation has been met. Where the practice of the Railroad, assented to by the Union, is to assign white employees to a higher and Negro employees to a lower seniority group, no action for breach of contract will lie. Unless the Courts can recognize this discrimina-

tion, and grant relief against it, the rule of *Steele* and *Tunstall* becomes completely meaningless.

2. The decision of the Court of Appeals is in direct conflict with the decisions of Supreme Courts of several states.

The Court of Appeals in this case has held that the Courts have no jurisdiction to afford relief for discrimination which occurs only in the performance of collective bargaining agreements. An examination of the allegations of the complaint (R. 5[3] and 155[4]) discloses that petitioners are not complaining of a breach of the agreement, but of discrimination carried out in accordance with the agreement. Even assuming, however, that this is a case where the gravamen of the complaint is a breach of the collective bargaining agreement, the decision of the Court of Appeals is in direct conflict with the decision of the Supreme Court of Errors of Connecticut in *Crowell v. Palmer,* 134 Conn. 502, 58 A. (2d) 729. In that case the Connecticut Court reversed the lower Court which had held that the plaintiffs in that case must exhaust their administrative remedy before the Railroad Adjustment Board before the Court could afford them relief against discrimination in the assignment of overtime work by their collective bargaining agent. There was no provision in the collective bargaining agreement,

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[3] "Plaintiffs were and each of them was accorded a seniority date in accordance with *Part I Article IV Rule 17 in the seniority Group and Class designated by the Railroad* * * *"

[4] "The said agreement did not provide any standard of adjudication by which it could be determined in which of the several seniority Groups and Classes new employees should be given seniority dates."

so far as appears from the opinion, by which this discrimination could be justified.

Likewise, in *Edelstein v. Duluth M. & I. R.R. Co.*, 225 Minn. 519, 31 N.W. (2d) 465, the Supreme Court of Minnesota held that railroad employees could sue the Railroad for back pay for discharge in violation of the seniority rights accorded them under a collective bargaining agreement, even though they had not exhausted their administrative remedies under the Railway Labor Act.

Again in *Griffin v. Gulf and Ship Isle R. Co.*, 198 Miss. 458, 21 So. (2d) 816, the Supreme Court of Mississippi held that the Court had the power to afford relief to Negro firemen who had been discriminated against in violation of the collective bargaining agreement governing their employment, where the respondent Railroad and respondent Union relied for defense on an award of the Railroad Adjustment Board. The Court found that the award of the Board was void because it had been obtained by the parties to the agreement without disclosing to the Board the discrimination of which the plaintiffs in that case complained. In such a case, the Court found that the plaintiffs had not, in fact, been represented before the Board, and were not parties to the proceedings before the Board. The plaintiffs had, therefore, not exhausted their remedies before that Board. The Court, nevertheless, found jurisdiction in the Courts to give relief to the plaintiffs.

The Supreme Court of Missouri in *State ex rel. St. Louis-San Francisco Ry. v. Russell*, 356 Missouri 975,

219 S.W. (2d) 340, considered a dispute between Negro porters and the Railroad, where the parties claimed discrimination by the Railroad in the elimination of jobs and the creation of new jobs under the jurisdiction of unions which did not represent the plaintiffs. Noting that the plaintiffs were members of a union of Negro porters, which was their collective bargaining agent under the act, the Court distinguished such a case from the situation presented in the *Steele* and *Tunstall* cases, where there was a conflict between a minority of the Class represented by their collective bargaining agent, and the bargaining agent. The Court remanded the parties to their administrative remedies.

A direct conflict between those decisions and the decision of the Court of Appeals below makes it extremely important that the law on this subject be clarified by this Court.

3. The practical consequence of the decision of the Court of Appeals is to deny petitioners any effective remedy whatever.

The Courts, including this Court, have recognized that when there is a conflict in interest between a minority within a Class or craft, represented by the sole bargaining agent under the Railway Labor Act, and the majority of the Class or craft, the Railroad Adjustment Board provides no adequate forum for the adjudication of this clash of interest. This was noted particularly by Mr. Justice Reed in his dissent in *Slocum v. D. L. & W. R. R. Co.*, 339 U.S. 239, where he points out, citing the Attorney General's re-

port on the Administrative Procedure Act, Senate Document No. 10, 77th Congress, that historically workers, who have not been represented before the Adjustment Board by their collective bargaining agents, have been unable to obtain hearings.

This is borne out by the facts in several of the decisions relied upon by petitioners here. In *Crowell v. Palmer,* the Supreme Court of Connecticut found that employees who complained of discrimination against them by their collective bargaining agent had been *unable to secure a hearing* before the Railroad Adjustment Board.

In *Griffin v. Gulf and Ship Isle R. Co.* the collective bargaining agent, together with the Railroad, had appeared before the Board and obtained an order which, the Railroad and the Union contended, permitted discrimination against Negro firemen. This award had been obtained by the failure of the collective bargaining agent and of the Railroad to disclose to the Board that it violated the rights of a minority within a Class or craft represented by the Union.

In *Edwards v. Capitol Airlines,* 176 F. (2d) 755, the Court of Appeals for the District of Columbia held in a dispute between the company and a minority of members of their collective bargaining agent, that an award of a mediation board was judicially reviewable, where the interests of the minority were contrary to the interests of the majority, despite language in the collective bargaining agreement making such awards final and binding upon all the parties. The

reason assigned by the Court was that, where the minority is represented in the proceedings by a hostile union, it cannot be presumed that the minority will obtain a fair hearing.

All of these cases demonstrated that the practical application of the Court of Appeals is to deny these petitioners any remedy whatsoever.

The importance of this decision, if it is followed in other jurisdictions, is apparent from a glance at the number of cases which in the past few years have reached the Courts of last resort, in which the problems presented were the same as those here. It is apparent from a reading of these cases that there is a move afoot within the established railroad unions to drive Negro workers out of the field. This is evidenced in the *Steele, Tunstall* and *Graham* cases most clearly, but also in many of the cases relied upon by petitioners here. The decision of the Court of Appeals, in this case, if followed, will effectively assist this drive to eliminate Negroes from employment. The number of workers affected may well extend eventually to all the Negro railroad workers in the United States. The effects of this judicial sanction of discrimination upon our foreign relations and upon our domestic political health needs no lengthy discussion.

4. This case presents a question of importance in the field of legislative and judicial regulation of trade unions and the collective bargaining process beyond the field of railway labor alone. The Supreme Court of California in *James v. Marinship,* 27 Cal. (2d) 795,

and *Williams v. Boilermakers Union,* 27 Cal. (2d) 586, and other cases, and the Supreme Court of Kansas in *Betts v. Easley,* supra, find in the decisions of this Court, and particularly in *Railway Mail Assn. v. Corsi,* 326 U.S. 88, 89 L. Ed. 2072, 65 S. Ct. 1483, a national policy which requires that trade unions who act as sole bargaining agents under federal legislation are affected with a public interest, and must protect the rights of all racial minorities and afford them equal opportunity for membership in and for the services of the union. If it is true that such a national policy exists, and if the *Steele* and *Tunstall* decisions are expressions of such a policy, then there is a conflict in principle between the decision of the Court of Appeals in this case and such national policy.

Such a conflict is of importance to all courts and administrative agencies which are confronted with cases involving discrimination by dominant trade unions. If the policy is no more than a declaration of hope or belief, then the decision of the Court of Appeals in this case may well stand as a declaration that such is the case. If, on the contrary, it is a national policy which the Courts will enforce, then the decision of the Court of Appeals must be reversed in order that all Courts and all administrative agencies faced with a similar problem will look beyond the words of the collective bargaining agreements to the practices of the parties, and stamp out discrimination by trade unions and employers.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
January 12, 1951.

Respectfully submitted,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 495

THOMAS E. HAYES, *et al.*, on Behalf of Himself and All Others Similarly Situated,

Petitioners,

vs.

UNION PACIFIC RAILROAD CO. (a corporation) and DINING CAR EMPLOYEES UNION LOCAL 372 (a voluntary unincorporated labor organization); and JAMES G. BARKDOLL, as District Director of said Local 372 in the District of Los Angeles, State of California,

Respondents.

Brief of Respondent Union Pacific Railroad Company in Opposition to Petition for Writ of Certiorari.

Questions Presented.

We do not agree with Petitioners' statement of the questions presented. The case does not involve a charge of discrimination by a collective bargaining agent and Railroad against negro employees in *seniority, wages* and *working conditions,* or in the *performance* of a collective bargaining agreement. It does involve a charge of discrimination by a railroad, without the opposition of the

collective bargaining agent, in the *hiring* of certain negroes. Precisely stated the questions presented are:

(1) Whether, under the Railway Labor Act, a district court has jurisdiction of a complaint which alleges that a railroad, with the connivance of the collective bargaining agent, has assigned certain negroes to lower seniority groups and classes than white persons when first employed.

(2) Whether, under the Railway Labor Act, a district court has jurisdiction of such a complaint where the affidavits filed by the parties on motions to dismiss the complaint show that no discrimination against negroes has been practiced in assigning persons to seniority groups and classes when first employed.

(3) Whether, under the Railway Labor Act, a district court has jurisdiction to establish future seniority rights contrary to the terms of a valid collective bargaining agreement.

Statement of the Case.

We will restate the case because Petitioners' statement is not accurate in all respects or complete. The case involves the affirmance by the Court of Appeals [R. 191] of the judgment of the District Court dismissing the complaint, on motion of the Respondents, for failure to state a claim upon which relief could be granted and upon the ground of lack of jurisdiction over the subject matter [R. 164]; and of the order of District Court denying Petitioners leave to file an amended complaint. [R. 163.]

The complaint was filed by Petitioner Thomas E. Hayes and was alleged to have been filed on behalf of himself, 87 persons named in an exhibit to the complaint and all other

employees of Respondent Union Pacific Railroad Company (hereafter called "Railroad") similarly situated. Although none of these persons except Hayes was ever made a party plaintiff, they were referred to throughout the complaint as "plaintiffs" and will be so referred to herein. *The complaint did not allege that it was brought on behalf of all negroes employed by Railroad in the craft involved,* but it did allege that all the plaintiffs were negroes employed in the dining car and commissary service of the Railroad. It alleged that plaintiffs were members or former members of Respondent Dining Car Employees Union Local 372 (hereafter called "Union") which acted as the exclusive bargaining agent of the craft pursuant to the Railway Labor Act. It alleged that since June 1, 1942 there had been in effect a collective bargaining agreement (hereinafter called "agreement") between Railroad and Union. [R. 2.] The petition herein concedes that the terms of the agreement are non-discriminatory in regard to the matters here involved. (P. 6.) The complaint alleged that Railroad, with the connivance of Union, had assigned plaintiffs to lower seniority groups and classes than white persons when first employed and by reason thereof the pay of white persons was materially larger than that of plaintiffs.[1] *It did not allege that all negroes employed in the craft had been so treated.* So far as

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[1]The complaint also alleged that Railroad, with the connivance of the Union, had failed to promote plaintiffs and accord them seniority rights in accordance with the agreement. Although affidavits were filed signed by Petitioner Hayes which attempted to support this charge, his counsel later conceded that this allegation could not be supported and we are not now concerned with this portion of the complaint. It will be noted that at no place in the Petition is it asserted that the Railroad failed to faithfully comply with the terms of the agreement. The claim here is that plaintiffs suffered a disadvantage in seniority when first hired from which they could never recover.

Railroad is concerned the complaint sought the following relief:

(1) A judgment declaring this practice to be illegal—in other words, a judgment declaring that Railroad could not assign a negro to a lower seniority group or class than a white person when first employed.

(2) A judgment according to plaintiffs seniority dates in such groups and classes as they would have been entitled to had Railroad assigned them to higher seniority groups and classes than it did when they were first employed—in other words, higher seniority than that to which they are entitled under the terms of the agreement.

(3) Damages and other incidental relief. [R. 2.]

Railroad and Union separately filed motions to dismiss the complaint on the grounds that it did not state a claim, the court lacked jurisdiction of the subject matter, failure of plaintiffs to exhaust their administrative remedy and other grounds not material here. [R. 32, 38.] Affidavits were filed by the parties which were considered by the District Court in passing on the motions. The competent evidence in these affidavits disclosed the following facts:

The Union admits negroes to membership on exactly the same terms and conditions as white men, it has a substantial negro membership, numbers negroes among its officers and two negro officers participated in the negotiation and execution of the agreement. [R. 25.]

The craft represented by the Union is the kitchen employees (hereafter called "cooks craft") on the dining, cafe-lounge and other similar cars operated by the Railroad. The great majority of the craft are negroes. Of 946 persons in the craft who held an employment relation-

ship with the Railroad at some time during the four-year period prior to the filing of the complaint, 583 were negroes and 363 were white. [R. 82.]

The agreement[2] provides for the four following separate seniority groups in each of which seniority is acquired with respect to a particular type of dining car service:

Group AA—Selective Runs (streamliner trains)
Group A—Standard Dining Car Runs
Group B—Challenger Runs
Group C—Cafe-lounge Car and Similar Runs

The different seniority groups reflect the varying types of dining car service offered on the different classes of trains operated by Railroad. The most complicated menus and luxurious service which require employees of the highest skill, are offered on the Streamliner trains (Group AA) and the simplest menus and service which require employees of the least skill, are offered on cafe-lounge and similar cars (Group C).

With the exception hereinafter noted, the agreement provides for the following separate seniority classes within each seniority group, each seniority class including employees of different skill and experience from those in another class.

1. Chef-caterers
2. Chefs
3. Second Cooks and Coach Buffet Cooks
4. Third Cooks, Dish-up Men and Cafe Car Cooks
5. Fourth Cooks and Coach Buffet Cook's Helpers.

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[2]The pertinent provisions of the agreement are set forth in affidavit of H. I. Norris. [R. 43.]

The skill and experience required in each class varies downward from the Chef-caterers class which class was established by the agreement only in seniority Group AA.

The rates of pay vary in each seniority group and class, the highest rates being paid in Group AA and in the Chef-caterer class.

The agreement provides the following rules relating to seniority and promotion. An employment relationship is established by 90 days continuous service in the cook's craft. Seniority is acquired in the group and class in which service is being rendered when an employment relationship is established. Seniority when acquired in a particular group and class also applies in all lower groups and classes. Seniority in a higher group or class is only acquired by being assigned to a non-temporary position and performing actual service therein. Service in temporary positions, which are available only temporarily because of sickness, leaves of absence, etc., of employees regularly assigned thereto, does not create seniority in the group and class in which temporary service is performed. All non-temporary positions are filled pursuant to bulletin issued by Railroad inviting all employees in cook's craft to apply or "bid." All employees desiring to be considered must submit written applications or "bids" within 10 days from date of bulletin, and assignment is made within 20 days from the same date. Employees are promoted on the basis of seniority, fitness and ability and except as to positions in Group AA, seniority governs promotions where fitness and ability are sufficient.

There is no provision in the agreement obligating Railroad to assign a new employee to any particular group or class, subject, of course, to the obligation to apply the promotion rules where an existing employee of equal fitness and ability applies for a position available to new em-

ployees. All provisions of the agreement apply uniformly and without distinction to colored and white persons.

In practice new employees, regardless of whether they are negroes or white persons, are generally first employed in inferior positions and later promoted under the terms of the agreement. [R. 48.] The petitioners complain of being initially assigned to inferior classes in Group B instead of Group A. The record shows that of the 583 negroes in the cook's craft who held an employment relationship with the Railroad at some time during the four year period prior to the filing of the complaint (whether first employed during said four year period or prior thereto), 318 established seniority in one of the two highest seniority groups (Groups AA and A) when first employed, and 253 established seniority in Group B when first employed. Of the 363 white persons in the craft who held an employment relationship during the same period, 345 established seniority in either Group AA or Group A when first employed and 18 in Group B.[3]

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[3]The following detailed tabulation shows the seniority established by the 946 cooks above mentioned at the time they were first employed. [R. 82.]

White			Negro		
Group	Class	No.	Group	Class	No.
AA	3 (Second Cooks)	2	AA	5 (Fourth Cooks)	10
AA	4 (Third Cooks)	9	A	2 (Chefs)	2
AA	5 (Fourth Cooks)	56	A	3 (Second Cooks)	13
A	2 (Chefs)	7	A	4 (Third Cooks)	39
A	3 (Second Cooks)	46	A	5 (Fourth Cooks)	254
A	4 (Third Cooks)	36	B	2 (Chefs)	4
A	5 (Fourth Cooks)	189	B	3 (Second Cooks)	27
B	4 (Third Cooks)	3	B	4 (Third Cooks)	64
B	5 (Fourth Cooks)	15	B	5 (Fourth Cooks)	165
		363	C	2 (Chefs)	1
			C	4 (ThirdCooks)	4
					583

The name and date of original hiring of each of the negroes listed in the above tabulation is set forth in affidavit of H. A. Hansen. [R. 111-135.]

At the time the complaint was filed on July 6, 1949, all Group B positions in the craft had been discontinued for reasons hereafter stated, and of the 507 cooks holding seniority in groups AA and A, 319 were negroes and 188 were white persons.[4]

In 1935 the Railroad initiated the operation of Challenger type trains which provided sleeper service at less than standard fares and dining car service with adequate but simple menus at greatly reduced prices. Group B seniority only was established by work on these trains. Many cooks who worked on these trains chose to remain in Group B seniority service although there were numerous occasions after the date of the agreement when assignments on standard dining cars carrying Group A seniority were available for bid to Group B personnel. The work in Group B service was less burdensome than in Group A

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[4]The following tabulation is found in affidavit of H. A. Hansen. [R. 23.]

Cooks Holding Group AA and Group A Seniority as of July 6, 1949

Chef-Caterers—Chefs		2nd Cooks		3rd Cooks		4th Cooks	
White	Colored	White	Colored	White	Colored	White	Colored
41	16	37	31	21	18	13	19

Cooks Holding Group A But Not Group AA Seniority As Of July 6, 1949

	Chefs		2nd Cooks		3rd Cooks		4th Cooks	
	White	Colored	White	Colored	White	Colored	White	Colored
	37	61	19	53	11	56	9	65
Grand Total	78	77	56	84	32	74	22	84

Total:
White 188
Colored 319

service and the wage differential less than $10.00 a month in favor of Group A. During the year 1947 all Challenger service was discontinued with the result that cooks having only Group B seniority could only exercise seniority rights in Group C and await an opportunity to establish a seniority date in Group A when positions become available. This obvious misfortune was suffered by white as well as colored cooks. On January 1, 1947, prior to the discontinuance of Challenger Service, there were 87 negroes and 31 white persons holding seniority in Group B. Most of the negroes in the cook's craft were not affected by the discontinuance of Challenger service. On January 1, 1947, 259 negroes and 110 white persons held seniority in Group A standard dining car service. [R. 54-59.]

The plight of the Group B cooks was made the basis of a charge by petitioner Hayes that the negro cooks in that group had been discriminated against by reason of their race. He demanded that Group B seniority dates be made applicable in Group A.

In letter from Petitioner Hayes to the General Chairman of the Union dated February 14, 1948, it was stated:

> "We are demanding the following:
>
> "(1) A complete elimination of all classes, AA, A, B and C because they have been used as a media to segregate and exploit the colored cooks and to take from them the seniority which they have accumulated with the Union Pacific by their own labor.

> "(2) That all cooks, regardless of Race, Color, Creed or National Origin, may exercise their seniority over any employee their junior on any train on the Union Pacific Railroad." [R. 85.]

This demand was not complied with. The action demanded would have adversely affected employees, both colored and white, holding seniority in Group A and would have violated the seniority provisions of the agreement.

Petitioner Hayes and most of the persons named in the exhibit to the complaint were negroes who had first been employed in Group B service. At the time the complaint was filed Petitioner Hayes and 71 of the 76 negroes named on the exhibit to the complaint whom Railroad could identify as being then employed in the cook's craft had acquired seniority dates in Group A. [R. 97.]

With this record before it, and after oral argument, the District Court issued its opinion in which it ordered the complaint dismissed. [R. 136.] Thereafter Petitioner Hayes and 86 persons (most of whom are the same but some of whom are different from the persons named in the exhibit to the complaint) filed motion for leave to file an amended complaint. The District Court denied leave to file the amended complaint, and thereupon signed and filed the Judgment of Dismissal of the original complaint. The persons named as plaintiffs in the proposed amended complaint were the appellants in the Court of Appeals and are the Petitioners here.

REASONS FOR DENYING THE WRIT.

I.

The Affirmance of the Order Denying Leave to File an Amended Complaint Is Not Asserted as a Reason for Issuance of the Writ.

There were two issues presented to the Court of Appeals:

(1) Whether the District Court erred in granting the motions to dismiss the complaint.

(2) Whether the District Court abused its discretion in denying leave to file the proposed amended complaint.

The Court of Appeals affirmed the action of the District Court on both issues. However, the Petitioners have not assigned as a reason for the granting of the writ the affirmance of the order of the District Court denying leave to file an amended complaint. The reasons assigned for issuance of certiorari deal with alleged errors of the Court of Appeals in its ruling upon the legal questions presented by the allegations of the original complaint. Accordingly, it is our understanding that the action taken by the court below with respect to the proposed amended complaint is not one of the issues raised by the Petition. Nevertheless we will discuss this question briefly later in this brief so that our position will be before the court.

II.

The Decision Below Is Not in Conflict With the Applicable Decisions of This Court or the State Courts in the Two Respects Mentioned by Petitioners.

(a) The Questions Raised by Petitioners Are Now Moot.

Strangely enough, the two points of error which Petitioners find in the decision below are points which relate to the allegations of the complaint which Petitioners' counsel has conceded to be unfounded and has withdrawn as an issue. The complaint not only charged the Railroad with originally hiring plaintiffs in lower seniority groups and classes than white men (which is the only alleged discrimination here complained of) but also with failure to promote the plaintiffs in violation of the terms of the agreement, all with the connivance of the Union. Both on brief and in oral argument before the Court of Appeals, Petitioners' counsel admitted that the agreement was nondiscriminatory in terms, that it did not control the matter of hiring and that plaintiffs after being hired had been promoted in accordance with its terms. The sole charge which was not dropped was the charge that plaintiffs had been discriminated against at the time of original hiring by being assigned to lower seniority groups and classes than white men were. Nevertheless, the combined opinions of the courts below discussed both contentions which had been asserted in the complaint.

As one ground of error, Petitioners assert that the decision below holds that Petitioners must exhaust their administrative remedies before the Railroad Adjustment Board before the federal courts can grant relief. As proof of this, they refer to and quote the statement of the

Court of Appeals based on the case of *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239, that

> "Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate tribunals have been established for that purpose. 45 U. S. C., par. 153, National Railroad Adjustment Board."

This ruling is plainly responsive to the allegation of the complaint (since withdrawn) that the Railroad had breached the agreement by failing to promote plaintiffs in accordance with its terms.

Petitioners also contend that the court below held that the Railway Labor Act imposes no duty on collective bargaining agents under the Act to protect minority members of the represented class *in the performance of collective bargaining agreements.* They assert that this is in error. We do not agree that the court so held. However, if it had so held, its ruling could only have been responsive to the allegation in the complaint that, with the connivance of the Union, Railroad had failed to promote plaintiffs in accordance with the terms of the agreement. Neither one of these statements of error deals with the sole controverted issue created by the complaint which is left for the consideration of this court. That remaining issue involves the obligations of the Railroad and Union, under the Railway Labor Act, with respect to the hiring of new employees by the Railroad. There is no issue left in this case for the consideration of this court dealing with the

obligations of the Railroad and Union with respect to the performance of the agreement referred to in the complaint. It is quite apparent that the two questions presented by Petitioners are moot questions so far as this case is concerned, and for that reason alone the petition should be denied. However, we will discuss the merits of these two assignments of error under the following subheadings of this topic.

(b) Under Railway Labor Act, District Courts Do Not Have Jurisdiction of Actions for Breach of or Involving Interpretation of Collective Bargaining Agreements.

The question determined in the opinion of the Court of Appeals and in the opinion of the District Court which it adopted was the jurisdiction of the District Court *under the Railway Labor Act.* The opinions did not determine the jurisdiction of the District Court in diversity of citizenship cases involving collective bargaining agreements. Addressing itself to the allegation in the complaint that the Railroad had failed to promote the plaintiffs in accordance with the agreement, the opinion of the District Court held that such an allegation did not present a federal question giving the court jurisdiction.[5] The question of

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[5]In its opinion the District Court said:

"At most the complaint, in its original and amended form, alleges a violation of provisions of the Agreement. Any right of action, if one exists, is based on the alleged breach of the Agreement and does not arise under the Railway Labor Act, but only from the consequent contractual relations of the parties. *Gully v. First National Bank,* 299 U. S. 109; *Malone v. Gardner,* 62 F. (2d) 15; *Barnhardt v. Western Maryland Ry. Co.,* 128 F. (2d) 709; *Burke v. Union Pac. R. Co.,* 129 F. (2d) 844. Since this is not an action arising under any Act of Congress regulating commerce, the Court has no jurisdiction under 28 U. S. C., par. 1337." [R. 143.]

whether a District Court lacks jurisdiction because no federal question is involved is entirely independent of the question of whether the court lacks jurisdiction because the case is one within the primary and exclusive jurisdiction of an administrative tribunal. The District Court's opinion which was adopted by the court below that no federal question was involved is obviously correct and supports the decision below independently of the decision on the other jurisdictional point. At the time the District Court decided the case the *Slocum* case had not been decided by this court. In adopting the opinion of the District Court the Court of Appeals added a reference to the rule in the *Slocum* case which was clearly applicable to the allegation of the complaint above mentioned. An action charging failure of a Railroad to promote employees in accordance with a collective bargaining agreement and asking for a declaration of future seniority rights is plainly an action over which the Railway Adjustment Board has exclusive jurisdiction under the ruling in the *Slocum* case. Hence the court below was correct in holding that in so far as this action involved an alleged breach of contract and sought a declaration of the seniority rights of plaintiffs under the agreement, it was an action within the jurisdiction of the Railway Adjustment Board and not within the jurisdiction of the District Court. The statement of the Court of Appeals concerning the exclusive jurisdiction of the Railway Adjustment Board constitutes a second reason why the District Court did not have jurisdiction of the claim asserted in the complaint that Rail-

road had failed to promote plaintiffs in accordance with the agreement.[6]

There is nothing in the cases of *Steele v. L. & N. R. Co.*, 323 U. S. 192, and *Tunstall v. B. of L. F. & E.*, 323 U. S. 210 holding to the contrary. Those cases did not involve a declaration of seniority rights under the collective bargaining agreement there before the court. In those cases an illegal collective bargaining agreement was struck down so that the aggrieved negro firemen involved would not lose the seniority rights which they had acquired under a prior agreement.

Petitioners rely principally on state court decisions in seeking to prove that the Court of Appeals erred in its ruling which we are here discussing. It is difficult to see how decisions of state courts can have any persuasive force upon a question involving the jurisdiction of a District Court, or how a conflict between such decisions and the decision of a federal Court of Appeals which is in accord with the decisions of this court, would in anywise justify the review by this court of the decision of the Court of Appeals. In fact, no conflict exists between the decision in question and the state court decisions cited.

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[6]Strictly speaking the question of the primary jurisdiction of the Railroad Adjustment Board can only arise in the District Court in an action where, but for the doctrine of primary administrative jurisdiction, the Court would have jurisdiction on some ground such as diversity of citizenship which is not the case here. Hence the statement in the opinion of the Court of Appeals that under the Railway Labor Act jurisdiction of actions for breach of collective bargaining agreements is reposed in the Railroad Adjustment Board can properly be viewed as not dealing at all with the problem of exhausation of administrative remedies. However, as we have pointed out, if it is viewed as a statement that the Railroad Adjustment Board has jurisdiction of such actions, *to the exclusion of the District Court,* it is a correct statement of the law announced in the *Slocum* case.

The case of *Crowell v. Palmer* (Conn.) 58 A. 2d 729 cited by Petitioners involved the jurisdiction of a state court, and obviously is not in conflict with the fundamental point decided by the court below which was that the District Court lacked jurisdiction because of absence of a federal question. The *Crowell* case was decided prior to the *Slocum* case which first definitely settled the extent of the primary and exclusive jurisdiction of the Railway Adjustment Board. A vital distinction between the *Crowell* case and the case at bar is that in the *Crowell* case an attempt had been made to take the case before the Adjustment Board which had refused jurisdiction, whereas there is no such situation here. It is obvious that this case does not support Petitioners' argument in this case.

The case of *Betts v. Easley* (Kan.), 169 P. 2d 831, is not pertinent here. It was an action against a Union which discriminated against negroes in membership to enjoin such discrimination and to enjoin the Union from acting as bargaining agent for the negro plaintiffs. It was not an action against a railroad, nor did it involve the breach of or interpretation of a collective bargaining agreement.

The case of *Edelstein v. Duluth M. & I. Ry. Co.* (Minn.), 31 N. W. 2d 465, was an action against a railroad for wrongful discharge. The jurisdiction of the trial court was sustained upon authority of *Moore v. Illinois Cent. R. Co.,* 312 U. S. 630. In so far as the case involved only an action for damages for wrongful discharge by an employee whose employment relationship had terminated, the jurisdiction of the court was sustained by the doctrine of the *Moore* case. In so far as the case involved a question of reinstatement or future application of a collective bargaining agreement, the decision on the

jurisdictional question was contrary to the later ruling of this court in the *Slocum* case.

The cases of *Griffin v. Gulf & Ship Isle R. Co.* (Miss.), 21 So. 816; *Washington Terminal v. Boswell,* 124 F. 2d 235 and *Edwards v. Capital Air Lines,* 176 F. 2d 755, are not in point. They involve the question of the effect of decisions of administrative tribunals, not the question of their primary and exclusive jurisdiction.

(c) Court Below Did Not Hold That the Railway Labor Act Imposes No Duty on Collective Bargaining Agents to Protect Minority Members of the Represented Class in the Performance of Collective Bargaining Agreements.

The contention made by Petitioners in subparagraph (b), page 9, of the petition is patently a misstatement of the holding of the court below. There is nothing in the language of the decision of the Court of Appeals quoted on page 13 of the petition which even remotely deals with the obligations of a collective bargaining agent. The opinion of the District Court does discuss the obligations of a collective bargaining agent. It will be recalled that the Railroad had been charged with failing to promote the plaintiffs in accordance with the terms of the agreement and the Union with acting in connivance with the Railroad in doing. In discussing the obligations of the Union under the *Steele* case the court said:

> "The decision of the Steele case affected the employer railroad only by the holding that the railroad could not take the benefits of a contract which the bargaining representative is prohibited by the statute from making (which is simply the statement of an elementary principle of contract law.) Such duty not to discriminate on the basis of race is imposed only on the statutory representative and only with

respect to collective bargaining and the making of contracts. . . .

"In the Steele and Tunstall cases, *supra*, the bargaining representative had made contracts which clearly violated this described duty. In the instant case neither the original complaint nor its amended forms contain any allegations that the respondent Union has violated this duty through collective bargaining or contracting. The sole allegation made against the Union is that it has acted "in connivance" with the Railroad in the practices allegedly committed by the Railroad." [R. 140-142.]

The court pointed out that the charge of connivance against the Union was the equivalent of a charge of mere inaction on the part of the Union. Of the word "connivance" the court said:

"This word cannot, without severe strain, be taken to mean 'participation through contracting.' Simply stated, the complaint alleges only that the Union has permitted, through failure to prevent, the existence of the alleged discriminatory practices of the Railroad." [R. 142.]

This is not a holding that the collective bargaining agent has no duty under the act to protect minority members of the represented class in the performance of collective bargaining agreements. It is a holding that mere inaction on the part of a Union in a breach by the Railroad of a collective bargaining agreement is not a violation by the Union of its obligations under the Act. It is not a holding that a Union is free to take affirmative action harmful to the minority members of a craft in matters relating to the performance of a collective bargaining agreement, as Petitioners' argument would imply.

The District Court's opinion is sound because the rights of the plaintiffs to recover for a breach of the collective bargaining agreement by the Railroad would constitute individual grievances with respect to which the Union would not have authority to take action without authority of the individual members of the craft involved.

This is made clear by the case of *Elgin J. & E. R. Co. v. Burley,* 325 U. S. 711, in which the Supreme Court pointed out that the Railroad Labor Act contemplated two types of disputes, (1) disputes over grievances and (2), disputes concerning the making of collective bargaining agreements. It held that while the act vested the bargaining agent with exclusive authority to negotiate and conclude agreements, that it did not vest the agent with such authority in respect to grievances and that in order for a railroad union to conclude its members by settlement of their grievances, authority from the members was necessary.

It is plain that if a collective bargaining agent does not have authority to act for its members in the matter of grievances under the act, that it does not violate its duty by failing to take action on behalf of a member of a craft whose right under a collective bargaining agreement has been violated by a Railroad. There is nothing in the *Steele* and *Tunstall* cases which hold that the obligations of a collective bargaining agent to refrain from discrimination extend beyond the boundaries of its right to act exclusively for the members of the craft.

III.

The Decision of the Court Below Is in Accord With Decisions of This Court Which Are Applicable to the Real Issue Presented by the Petition.

(a) Railway Labor Act Does Not Prohibit Racial Discrimination by Railroads in the Hiring of Employees.

The only issue presented by the complaint which is left for consideration by this court, as a result of the withdrawal by Petitioners of the charge that the Railroad had failed to comply with the seniority provisions of the agreement is the charge that the Railroad, with the connivance of the Union, discriminated against the plaintiffs when they were originally hired. We will first discuss this charge solely upon the allegations of the complaint, unaided by the true facts which were placed before the District Court which showed that Railroad had not been guilty of the discrimination alleged.

There is no claim in the complaint that the Railroad and Union made a collective bargaining agreement that discriminated against negroes or that Railroad failed to faithfully carry out the terms of the agreement. It was merely a party to an agreement which established separate seniority groups and classes for different classes of service within the cook's craft. The complaint is that when the plaintiffs were first hired, they were hired in positions which had lower seniority status than those given to white men when first hired. The complaint does not clearly allege that this happened to all negroes who were hired in the cook's craft—only the plaintiffs—and hence does not clearly state a case of racial discrimination. All employees hired cannot be given the same status and it is not racial discrimination to hire some negroes in lower rated posi-

tions and other negroes in higher rated positions. However, for purposes of argument, we will assume that it has been alleged that the plaintiffs were originally hired by the Railroad in Group B positions solely because of their race.

The decisions of this court have clearly settled the proposition that such conduct on the part of a railroad is not prohibited by the Railway Labor Act. This proposition is so well settled that there is not presented here a genuine and present controversy with respect to the construction or effect of a federal law which is required to give a District Court jurisdiction of the case on the ground that a federal question is presented.

Gully v. First National Bank, 299 U. S. 109;

California Water Service v. Redding, 304 U. S. 252.

The Railway Labor Act is not a Fair Employment Practices Act. It does not undertake governmental regulation of wages, hours or working conditions nor interfere with the normal right of an employer to select its employees or discharge them so long as the employer does not impair the collective bargaining process.

Terminal R. R. Assn. v. Brotherhood of R. R. Trainmen, 318 U. S. 1 at p. 6;

Texas & N. O. R. Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U. S. 48 at p. 571;

Virginia Ry. Co. v. System Federation, 300 U. S. 515 at p. 559.

The Act is concerned with collective bargaining and mediation.

Switchmen's Union of N. A. v. National Mediation Board, 320 U. S. 297;

General Committee B. L. E. v. Southern P. Co., 320 U. S. 338;

General Committee B. L. E. v. M. K. T. R. Co., 320 U. S. 323.

The cases of *Tunstall v. B. of L. F. & E.,* 323 U. S. 210 and *Steele v. L. & N. R. Co.,* 323 U. S. 192, do not hold otherwise. They merely declare the obligations of the collective bargaining agent, and further hold as an incidental proposition of contract law that a railroad cannot be bound by or enjoy the benefits of an agreement which has been entered into in violation of the act by the collective bargaining agent. They do not attempt to define the obligations of railroads to negroes under the Railway Labor Act. These cases disclose the fact that there was a practice in effect on some southern railroads which prohibited the promition of negro firemen to the status of locomotive engineers. Yet the decisions do not condemn or even discuss this practice.

(b) The Conduct With Which Union Is Charged Does Not Furnish a Basis for Jurisdiction of the Claim Against the Railroad.

The complaint charges the Railroad with being the active wrongdoer in hiring the plaintiffs in Group B positions. The only charge against the Union is that the Railroad acted with the Union's "connivance." This is the equivalent of the charge that the Union simply did

nothing to oppose the action of the Railroad.[7] If the Union had an obligation to the plaintiffs which it failed to fulfill, such failure to act could not make the action of the Railroad unlawful. The freedom enjoyed by a Railroad under the Railway Labor Act in hiring employees cannot be erased by the fact that a Union fails to oppose its conduct, or be changed by reason of the fact that a Union does oppose its act. If the Union violated a duty to the plaintiffs which the court could enjoin, that fact would furnish no basis for any decree against the Railroad depriving it of the freedom it enjoys under the act in hiring employees. Hence there is no occasion here for any ancillary jurisdiction over the Railroad based upon the primary jurisdiction of a cause against the Union, such as there was in the *Tunstall* case where it was necessary for the court to strike down an agreement between two parties which had been entered into in violation of the legal obligations of one of the parties to it.[8]

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[7]The word "connivance" means "intentional failure or forbearance to discover a wrongdoing; voluntary oversight; passive consent or cooperation" and in law "corrupt or guilty assent to wrongdoing, not involving actual participation in it, but knowledge of, and failure to prevent or oppose it." Webster's International Dictionary; *Brandon v. Holman* (C. C. A. 4th), 41 F. 2d 586.

[8]The acts charged against each respondent in the complaint are separate and distinct. Jurisdiction over a claim against one defendant by virtue of a federal matter will not support jurisdiction over a separate claim against another.

3 Moore's Federal Practice 2d 2725;
Pearce v. Penn. R. Co. (3rd C. C. A., 1927), 162 F. 2d 524;
Wasserman v. Perugini (2d C. C. A., 1949), 173 F. 2d 305;
Bullock v. U. S. (D. C. D. N. J., 1947), 72 Fed. Supp. 445;
New Orleans Public Belt R. Co. v. Wallace (5th C. C. A., 1949), 173 F. 2d 145;
Sheaf v. Minn. S. L. R. Co., 162 F. 2d 110;
Musher Foundation v. Alba Trading Co. (2d C. C. A., 1942), 127 F. 2d 9, cert. den. 317 U. S. 642;
Norris v. Mayor of Baltimore (D. C. D. Md., 1948), 78 Fed. Supp. 451.

It is plain, however, that the complaint charges no actionable wrong by the Union over which the District Court had jurisdiction. The area of the employment relationship here involved is one in which the Union had no right to act for the plaintiffs and hence had no obligation to act for their protection. The obligation of the collective bargaining agent to treat all members of the craft fairly and indiscriminately arises only by implication under the Railway Labor Act from its right to act as their exclusive agent in matters relating to collective bargaining, and its obligation is no broader than its right to act exclusively for the members of the craft. There are matters involving the employment relationship which this court has recognized as falling outside the exclusive power of the bargaining agent and within the power of the individual employee. Individual grievances under collective bargaining agreements[9] and the act of hiring[10] are among those which are subject to individual agreement and control. It follows that within these areas the bargaining agent, having no authority to act, has no obligation to act. The rule announced in the *Steele* case is in complete accord with this.

There is no claim by petitioners here that the agreement in question controlled the matter of hiring or the designation of the position which a new employee might be given when hired. The agreement simply provided that seniority would be established in the group and class applicable to the position in which the new employee established an employment relationship with the Railroad. The Railroad was free to select its own employees and to offer

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[9]*Elgin, J. & E. R. Co. v. Burley,* 325 U. S. 711.

[10]*J. I. Case v. N. L. R. B.,* 321 U. S. 332.

them such positions as it desired to. consistent with its obligations to existing employees under the agreement. Each new employee was entitled to accept or reject any position offered to him by the Railroad without interference from the Union.[11] Each of the plaintiffs was undoubtedly willing to accept a position in Group B at the time he was hired. It cannot be validly argued here that the Union had any right under the Act to intervene and prevent the Railroad and each plaintiff from concluding a contract for employment of the plaintiff in this class of service. Hence the charge here that the Union failed to take action opposing the assignment of the plaintiffs to positions in Group B does not charge the Union with any violation of its duties under the act.

(c) No Justiciable Controversy Within Jurisdiction of the District Court Is Presented by the Complaint.

It is quite apparent that the petitioners seek a change in their seniority status under the agreement in spite of the fact that it is conceded that the agreement itself is non-discriminatory and has been faithfully carried out by the Railroad. The prayer in the complaint is

> "for an order according to plaintiffs, and each of them such seniority dates in such class or classes and group or groups as they would have been entitled to had there been no discrimination against them by defendants."

There is no authority given a court by the Railway Labor Act to change the seniority status of an employee under

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[11]It should be observed here that the provisions of the Railway Labor Act which governed at the time of the acts herein complained of prohibited closed shop or union shop agreements. Title 45, U. S. C., Sec. 152, par. Fifth.

the circumstances of this case, and hence there is no justiciable controversy stated in the complaint.

A railroad employee has no inherent right to seniority in service. Such seniority can only arise out of a contract or from statute.

> *Trailmobile v. Whirls,* 331 U. S. 40, note 21, at p. 53;
>
> *Edelstein v. Duluth, Missabe & Iron Range Ry.* (Minn. 1948), 31 N. W. 2d 465 at p. 470.

The Railway Labor Act itself creates no seniority rights, but only a procedure for bargaining for such rights.

> *Austin v. Southern Pacific* (1942), 50 Cal. App. 2d 292;
>
> *Starke v. N. Y. C. & St. Louis RR. Co.* (7th C. C. A. 1950), 180 F. 2d 569 at p. 571.

Accordingly the only seniority rights which petitioners can have are the seniority rights which the agreement accords them. The agreement was lawfully negotiated and contains no discriminatory provisions. If the petitioners have been disadvantaged it is because they accepted employment with the Railroad in positions which provided only Group B seniority status and which they had the right to reject if unsatisfactory; and also because they did not elect to bid for higher rated jobs in Group A which were available to them on numerous occasions while they were working on Group B jobs.

Without a doubt, so long as the agreement stands, the seniority of the plaintiffs cannot be changed except in accordance with its provisions. A court has no power to rewrite agreements for the parties although it may strike them down if they are illegal. *Shipley v. Pittsburgh & L. E. R. Co.* (D. C., W. D., Penn. 1949), 83 Fed. Supp. 722 at p. 746. If the agreement were struck down by the court, it would be powerless to fix any seniority rights for plaintiffs because there would be no agreement upon which to base such rights.

The only way in which the plaintiffs can appropriately seek a change in the seniority provisions of this lawful agreement is through the collective bargaining process because in the absence of unlawful discrimination by the collective bargaining agent in the making of the agreement, a court will not disturb the agreement of an employer and the authorized bargaining agent.

> *Langhurst v. Pittsburgh & L. E. R. Co.* (Penn.), 17 Labor Cases, par. 65, 314.

The foregoing considerations support the judgment of the court below and are not in conflict with the rule announced in the *Steele* and *Tunstall* cases. In those cases the aggrieved negro fireman had acquired seniority rights under a lawful collective bargaining agreement. These rights were changed by a later agreement between the employer and bargaining agent under such circumstances as to make the later agreement illegal. This court declared that the later agreement should be invalidated in order

that the negro fireman could be restored to their former contract rights. In doing so the court created no seniority rights for the negro firemen. It merely protected existing rights from encroachment by illegal acts.

(d) The Facts Disclosed by the Affidavits Support the Decisions Below.

This court has held that where an issue of fact is created with respect to a jurisdictional question upon a motion to dismiss, the court is not bound by the pleadings but may inquire into the true facts. *McNutt v. General Motors Acceptance Corp.,* 298 U. S. 178; *K. V. O. S. v. Associated,* 299 U. S. 269. In passing on the motions to dismiss, the District Court considered the affidavits of the parties and set forth some of the facts appearing therefrom in its opinion. Following the issuance of its opinion, the affidavits were again before the court on the motion of petitioners to file an amended complaint. After denying leave to amend the court signed the judgment of dismissal which contained the following recital

> "and it appearing to the Court after considering the complaint, the amendments thereto, the affidavits filed by the parties, and the statements of counsel, that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment of dismissal as a matter of law."

It is quite apparent that the facts disclosed in the affidavits were fully considered by the District Court in rendering its judgment, and that it determined that there was no competent evidence in the affidavits of plaintiffs on a

material fact which disputed the facts in the affidavits of the respondents which supported its judgment.

One thing is beyond controversy. 318 of the 583 negroes who had held an employment relationship with the Railroad in the cook's craft during the four years prior to the filing of the complaint were given positions in Groups A or AA when they were first employed. Their names and dates of hiring are set forth in the affidavits of the Railroad. Not one of these 318 negroes has filed an affidavit in this case denying the above statements. This evidence disposes of the only issue before this court—the charge that the Railroad discriminated against negroes in the assignment of seniority when they were first hired. These are facts which the District Court was entitled to consider and did consider outside of the pleadings in arriving at a conclusion concerning its jurisdiction of the case. They support the conclusion it reached.

The competent evidence in the affidavits makes is clear that this case does not involve the issue of racial discrimination at all. The great majority of the craft here involved are negroes who enjoy seniority in every group and class established by the agreement. This has resulted from the fact that the Railroad has employed white men and negroes indiscriminately in all groups and has promoted men of both races strictly in accordance with the agreement. The true controversy is between a small group of negro cooks who held only Group B seniority when Challenger trains were operated and who were placed at a disadvantage by the discontinuance of Chal-

lenger train service. Petitioner Hayes, the leader of this group has demanded the abolition of the group seniority system so that his group can improve their seniority standing to the detriment of the great majority of colored and white cooks who held seniority in the higher groups at the time the Challenger trains were discontinued. This is the true controversy. It is one which cannot be resolved by either a court or the Railway Adjustment Board because neither has the power to change the contract which the Union has negotiated with the Railroad for the benefit of all the members of the craft. If a change in the seniority provisions of the agreement is to be had, it can only be accomplished through the collective bargaining processes provided by the Railway Labor Act.

If the true controversy in this case involved an alleged breach of the agreement, or a dispute over the interpretation of its terms, the case would present a controversy within the exclusive jurisdiction of the Railway Adjustment Board and not the District Court as pointed out by the Court of Appeals. However, with the withdrawal by petitioners of any claim that Railroad failed to comply with the agreement, it becomes clear that the controversy is one which is not capable of adjudication by any tribunal, judicial or administrative. This is so because the petitioners are not trying to establish rights under the agreement, but are trying to *avoid* the agreement and to establish seniority rights *in spite* of the agreement and in the *absence* of any other contractual support for their claims.

IV.

Affirmance of Judgment Denying Leave to Amend Furnishes No Reason Justifying Issuance of Certiorari.

Even if this court should conclude that the court below erred in affirming the order of the District Court denying the Petitioners leave to file an amended complaint, it should not grant the writ unless some important legal principle were involved which required the attention of this court for one of the reasons stated in its Rule No. 38. No such important legal principle is here involved nor was there any error in the ruling of the Court of Appeals. The proposed amended complaint was offered after the District Court had issued its opinion. The proposed amended complaint was substantially the same as the original complaint except that the second cause of action therein alleged that at the time the agreement was made, there was in effect a practice of the Railroad to assign negroes to lower seniority groups and classes than white men when first employed, and that the Railroad and Union entered into a contemporaneous verbal understanding "modifying" the agreement, to continue the discriminatory practice. Prior to the time the opinion was issued, the plaintiff Hayes had twice, without leave, filed amendments to the complaint and one supplemental complaint, had filed two lengthy affidavits and his counsel had orally argued the case. At no time had the existence of the foregoing facts been suggested by Petitioner Hayes and his counsel. Furthermore, the proposed amended complaint was offered against the factual background already dis-

closed which demonstrated an entire lack of any discriminatory practices on the part of the Railroad and the Union. It was offered in an obvious attempt to avoid the consequences of the District Court's opinion regardless of the facts. In the Petitioners' brief before the Court of Appeals is found a curious explanation for the proposed amendment.[12] The Respondents opposed the filing of the amended complaint on the grounds that the allegations were made without regard to the truth and were pure sham; also that it, like the original complaint, did not state a cause of action within the jurisdiction of the court. In affirming the judgment of the District Court, the Court of Appeals did not discuss the proposed amended complaint apart from its discussion of the original complaint. It must be presumed that its decision was based solely on the ground that it had not been shown that the District Court had abused its discretion in denying leave to amend. There is no important legal principle of widespread interest involved in such an affirmance and consequently the ruling furnishes no justification for the

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[12]"The second cause of action set forth in the amended complaint was designed to meet the Court's position that the collective bargaining agent, defendant Union, had not violated its duties as such by entering into a written contract with defendant Railroad discriminatory against plaintiffs in express terms.

"It has always been the opinion of counsel that the decision of the District Court was wrong, and that the original complaint stated facts bringing the case within the jurisdiction of the District Court. But, out of abundant caution, plaintiffs attempted to bring the case within the Court's ruling by charging that there was contractual action on the part of the collective bargaining agent, defendant Union, in violation of its duties as such." Brief for Appellants in Court below, pp. 10, 11.

granting of the writ. This is impliedly conceded by the petition because the ruling of the Court of Appeals in this respect is not assigned as a reason for the granting of the writ, nor is the point argued. For that reason, we will not here discuss, as we did in our brief before the Court of Appeals, the insufficiency of the allegations of the proposed amended complaint to state a cause of action within the jurisdiction of the District Court.

Conclusion.

It is respectfully suggested that the Petition be denied.

Respectfully submitted,

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CLERK

In the Supreme Court of the United States

OCTOBER TERM 1950

No. 495

THOMAS E. HAYES, et al., on Behalf of Himself and All Others Similarly Situated,

Petitioners,

vs.

UNION PACIFIC RAILROAD CO., a corporation, and DINING CAR EMPLOYEES' UNION LOCAL 372, a voluntary unincorporated labor organization; and JAMES G. BARKDOLL, as District Director of said Local 372 in the District of Los Angeles, State of California,

Respondents.

Brief of Respondent Dining Car Employees' Union Local 372 In Opposition to Petition for Writ of Certiorari

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vs.

UNION PACIFIC RAILROAD CO., a corporation, and DINING CAR EMPLOYEES' UNION LOCAL 372, a voluntary unincorporated labor organization; and JAMES G. BARKDOLL, as District Director of said Local 372 in the District of Los Angeles, State of California,

Respondents.

Brief of Respondent Dining Car Employees' Union Local 372 In Opposition to Petition for Writ of Certiorari

STATEMENT OF THE CASE

Respondent Dining Car Employees' Union is the collective bargaining representative under the Railway Labor Act of kitchen employees in the dining cars of trains operated by Respondent Railroad, and the two are parties

to a collective bargaining contract executed under date of June 1, 1942.

While the Petition herein asserts that Negroes constitute a minority in the crafts represented by the Union, the complaint did not contain any such allegation, and Petitioner's assertion is not supported by anything in the record. The record is entirely consistent with the hypothesis that Negroes are in the majority[1] and hence in a position to control the selection and policies of a collective bargaining representative.

Respondent Union admits Negroes to membership on exactly the same terms and conditions as white men, and a substantial portion of its membership is negro (R. 26). Of its five principal officers (a General Chairman and four District Chairmen), two of the District Chairmen are Negroes (ibid.). These two Negroes were among the Union officers who negotiated and executed the collective bargaining contract above mentioned (R. 26-27).

The contract does not in any way discriminate against Negroes. On the contrary, it guarantees Negroes exactly the same rights and privileges as white men, without differentiation of any kind.

Nevertheless, Petitioner Hayes (hereinafter called the Petitioner) filed suit claiming that Respondent Railroad, since execution of the above contract, had discriminated

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[1]In this connection, the record shows that out of a total of 946 persons employed by the Railroad in its dining car kitchens during the past four years, 583, or in excess of 61 percent, were Negroes (R. 82). We do not cite this fact as being conclusive that Negroes are in the majority in the crafts represented by the Union because the Union also represents certain crafts other than those in the dining car kitchens. The record does not show what portion of the employees in the latter crafts are Negroes. However, the record certainly does not justify an assumption that Negroes are in the minority.

against Negroes in a certain respect hereinafter mentioned, that Respondent Union had failed to take remedial action, and that Respondent Union therefore had been guilty of a breach of its duties under the Railway Labor Act within the doctrine of *Steele v. Louisville & Nashville R. R. Co.*, 323 U.S. 192, *Tunstall v. Brotherhood of Locomotive Firemen and Engineers,* 323 U.S. 210, and *Graham v. Brotherhood of Locomotive Engineers and Firemen,* 338 U.S. 232.

Respondents moved to dismiss the complaint, and the District Court filed a written opinion granting their motions upon the ground that the Union's inaction did not constitute a breach of any duty imposed by the Railway Labor Act and that the complaint therefore did not state a claim within the Court's jurisdiction (R. 136 et seq.). Thereafter, Petitioner moved for leave to file an amended complaint; this motion was denied and a judgment was entered for Respondents reciting that there was "no genuine issue as to any material fact" (R. 164-165).

The Court of Appeals adopted the opinion rendered by the District Court in granting the motions to dismiss and, in respect to the claim against the Railroad, added a comment of its own to the effect that the Railway Labor Act does not confer jurisdiction of claims for breach of contract upon the Federal Courts (R. 189 et seq.). The Court of Appeals did not find it necessary to examine the factual issues presented by the actual judgment.

In seeking review by this Court, Petitioner contends that the opinions below conflict with prior decisions of this Court and others. Those opinions, as already noted, were directed solely to the sufficiency of the complaint, whereas the judgment itself was based on factual grounds. In any event, Petitioner's contention, as we shall see, is without merit.

The Proceedings Below

Petitioner's original complaint, which was twice amended without curing the defects hereinafter mentioned, alleged that Respondent Railroad had discriminated against Negroes in various ways and that this discrimination had been practiced with the "connivance" of Respondent Union (R. 5, 6, 7, 8). Both Respondents moved to dismiss and supported their motions by affidavits (R. 25, 43). Petitioner filed counter-affidavits (R. 60, 102) and Respondents filed replies thereto (R. 80, 110, 111). The motions to dismiss were granted (R. 144).

As above noted, the only charge against Respondent Union was that the Railroad's alleged discrimination was practiced with the Union's "connivance." The term "connivance" means simply "corrupt or guilty assent to wrongdoing, not involving actual participation in it, but knowledge of, and failure to prevent or oppose it." Webster's International Dictionary. See also Bouvier's Law Dictionary, and *Brandon v. Holman,* 41 F.(2d) 586, 588, both quoted by the District Court (R. 142). Petitioner's use of the word "connivance" was not simply a careless selection of an inept term, for, as revealed by his affidavits, all that Petitioner in fact claimed was that the Union's officers "have with full knowledge of the facts, failed to take any remedial action on behalf of Negro members of the Local against the discriminatory practices of defendant railroad" (R. 69). Accordingly, the District Court construed the complaint as charging simply "that the Union has permitted, through failure to prevent, the alleged discriminatory practices" of the Railroad (R. 142). As above noted, it held that the Union's alleged inaction was not a breach of any duty imposed by the Railway Labor Act.

Thereafter, Petitioner moved for leave to file an amended complaint in which he alleged that at the time of execution of the collective bargaining contract the Respondents had entered into a contemporaneous "verbal agreement" calling for the alleged discriminatory practice in question (R. 155). However, the affidavits on file showed the proposed amended complaint to be sham. More particularly, they showed that the Railroad had not in fact been guilty of any discriminatory practice whatever and that Petitioner's allegations in respect thereto and in respect to a "verbal agreement" were pure fabrications (see pages 7, 8-9, *infra*). The Court therefore denied leave to file the amended complaint and entered a judgment for Respondents (R. 164-165) pursuant to Rules 12(b) and 56 of the Rules of Civil Procedure, which provided for a summary judgment where there is no "genuine issue as to any material fact."

On appeal, the Court of Appeals adopted the District Court's opinion, which opinion, as already noted, was addressed solely to the sufficiency of the original complaint, and added a few comments of its own addressed to the same subject. These opinions therefore are to be considered in the light of the allegations of the original complaint, and not of the proposed amended complaint. Furthermore, it should be kept in mind that the opinions do not deal with the factual grounds upon which judgment ultimately was based.

The Alleged Discrimination

To render comprehensible Petitioner's claim that the Railroad discriminated against Negroes, it is necessary to refer briefly to the system of seniority provided for by the collective bargaining contract.

The contract classifies the trains operated by the Railroad into four "Seniority Groups," according to the type of dining car service offered. Group AA is comprised of streamliners; Group A is comprised of the standard dining car runs; Group B is comprised of trains such as those formerly known as the "Challengers"; and Group C is comprised of cafe-lounge, cafe-observation and cafe cars (R. 44, 47).

Similarly, the various jobs in the dining car kitchen are classified in "Seniority Classes." Class 1 embraces the Chef-Caterers (employed only on Group AA trains); Class 2 embraces the Chefs; Class 3 embraces the Second Cooks and Buffet Cooks; Class 4 embraces the Third Cooks, Dish-up Men and Cafe Car Cooks; and Class 5 embraces Fourth Cooks and Coach Buffet Cooks Helpers (R. 44, 46).

By the terms of the contract, a new employee acquires an "employment relation" after a probationary period of ninety days of continuous service, and he acquires a seniority date "in the seniority class and group in which such ninety days of continuous service is completed, in all lower classes in that group, and in all corresponding and lower classes in all lower groups" (R. 52). This means, for example, that if a man is hired to fill a vacancy in a Class 3 job on a Group A train and survives his probationary period, he acquires a seniority date in Class 3 and all lower classes and in Group A and all lower groups.[2]

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[2]Petitioner's statement that the contract provided for assignment of new employees to a seniority group "without stating any basis upon which the group was to be chosen" (Pet., p. 16) is false, and the original complaint contained no such allegation. As stated in the text, Part I, Art. IV, Rule 17 of the contract provides that a new employee acquires a seniority date in the group in which he is em-

The contract also provides for promotion "based on seniority, fitness and ability," and provides that "fitness and ability being sufficient, seniority shall prevail" (R. 51). When a vacancy occurs or a new position is created, existing employees are entitled to bid thereon, and the bidder with the highest seniority, provided he has the requisite ability, gets the job (R. 49, 50-51). Thus, for example, if a vacancy occurs or a new position is created on a Group A train, and there is no qualified bidder having Group A seniority, the bidder with the highest Group B seniority who has the necessary qualifications is assigned the job, and he thereupon acquires a Group A seniority date (R. 52).

The original complaint alleged that the Railroad discriminated against Negroes (a) by assigning them to Group B rather than Group A at the time of initial hiring (R. 5-6) and (b) by thereafter refusing to promote them to Group A (R. 7). In short, it was Petitioner's original claim that Negroes were denied Group A seniority. However, in view of the fact, which Petitioner was forced to concede, that he himself held Group A seniority (R. 28, 67), and that 61 of the 87 Negroes whom he named as members of the class in an appendix to his complaint likewise held Group A seniority (R. 28-32), Petitioner, during the course of the proceedings on the motions to dismiss, modified his claim[3] so as to concede that the Railroad *promoted* Negroes to Group A. He nevertheless continued to assert that the Railroad refused to assign

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ployed and in all lower groups. The complaint alleged that newly employed negroes were "accorded a seniority date *in accordance with* the terms of Part I, Art. IV, Rule 17 * * *" (R. 5: emphasis supplied).

[3]This was done in his affidavits. He did not actually amend his complaint, but stated his intention to do so (R. 77-78).

Negroes to Group A *at the time of hiring.*[4] This is the claim asserted in the Petition for Certiorari.

Petitioner's allegation that Negroes, at the time of hiring, were discriminatorily assigned Group B rather than Group A seniority does not mean that Negroes, though filling vacancies on Group A trains, were nevertheless denied Group A seniority. We say this because such conduct on the part of the Railroad would have been a breach of contract and Petitioner specifically disclaims any intention to charge such a breach.[5] Far from alleging such a breach, the complaint alleged that Negroes at the time of hiring were "accorded a seniority date in accordance with the terms of Part I, Art. IV, Rule 17" of the contract; and that Rule, as already noted (p. 6, *supra*) provides that a new employee is entitled to a seniority date in the group and class in which he is hired (provided, of course, that he survives his probationary period).

The allegation means, therefore, not that Negroes, though filling vacancies on Group A trains were nevertheless denied Group A seniority, but that the Railroad refused to hire Negroes to fill vacancies on Group A trains but hired them only on Group B trains. In short, what Petitioner claims is that the Railroad discriminated against Negroes in hiring, a matter not covered by the contract and in which the Union had no voice.[6]

In any event, however, and no matter which of the above meanings Petitioner's claim may have, the claim is sham. We say this because the Railroad had not in fact

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[4]This claim likewise was a fabrication. See page 8, *infra*.

[5]Petitioner states, "An examination of the allegations of the complaint * * * discloses that petitioners are not complaining of a breach of the agreement * * *" (Pet., p. 17).

[6]The contract contains no provisions governing hiring.

been guilty of any discrimination against Negroes either in hiring or in observance of the contractual provisions governing seniority. More particularly, the affidavits showed that of all of the men who had worked in the Railroad's dining car kitchens during the preceding four years, a total of 663 had been hired initially in Groups AA and A and had been granted their initial seniority therein; and that of these, 318, or approximately one-half, were Negroes (R. 82).

QUESTIONS PRESENTED

We do not agree with Petitioner's statement of the questions. More particularly:

1. Petitioner is incorrect in stating that the opinions below present the question whether exhaustion of administrative remedies before the National Railroad Adjustment Board is a jurisdictional prerequisite to the granting of relief by the courts. The opinions below do not discuss or even mention the subject of exhaustion of administrative remedies. The language which Petitioner quotes from the opinion of the Court of Appeals is simply a statement, which plainly is correct, that the Railway Labor Act does not confer jurisdiction upon the Federal Courts of claims for breach of contract, but reposes such jurisdiction elsewhere.

2. The second question stated by Petitioner is inaccurate insofar as it implies participation by the Union in the alleged discriminatory practice of the Railroad. The District Court construed the complaint as charging the Union merely with inaction, and the Court of Appeals concurred in this construction (see page 4, *supra*). This construction, we submit, was proper. In any event, the propriety of a construction placed upon a pleading peculiar

to the particular case and concurred in by both Courts below is not the sort of question that this Court ordinarily will review.[7] If the construction placed upon the complaint by the Courts below be accepted as correct (and we submit that it should be) then, insofar as the Union is concerned, the question presented by the opinions is as follows:

> Where a railroad union has obtained from a railroad a collective bargaining contract which secures to negroes exactly the same rights as it secures to white men without differentiation of any kind, but the railroad nevertheless discriminates against Negroes in hiring—a matter not covered by the contract —does the Railway Labor Act impose upon the union a duty to take action?

3. Petitioner's statement of the questions ignores the fact that the District Court ultimately concluded, in rendering judgment, that Petitioner's claim was sham and presented "no genuine issue as to any material fact." Whether that conclusion was justified by the affidavits is a factual question which, in view of this Court's pronouncements as to the role of its certiorari jurisdiction, we will not examine in this brief.[8] There then remains only the following question:

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[7]This Court has said that it will not grant certiorari to "give the defeated party in the Circuit Court of Appeals another hearing" on matters peculiar to the particular controversy and without general significance. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163. See also *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508.

[8]See note 7, *supra*. This Court has said that "We do not grant a certiorari to review evidence and discuss specific facts" (*United States v. Johnson*, 268 U.S. 220, 227) or "to review the evidence or inferences drawn from it" (*General Pictures Co. v. Electric Co.*, 304 U.S. 175, 178).

Where affidavits filed in proceedings upon a motion to dismiss show that the plaintiff's claim is a fabrication and is sham, may the Court properly enter a judgment of dismissal?

ARGUMENT

I. The Opinions Below Did Not Touch Upon the Subject of Exhaustion of Administrative Remedies. They Held Merely That the Railway Labor Act Does Not Confer Jurisdiction Upon the Federal Courts of Actions for Breach of Contract.

We need add very little to what has already been said. The Courts below did not even mention the question, which Petitioner seeks to present to this Court, whether Petitioner was required to exhaust his administrative remedies before seeking judicial relief. That portion of the opinion of the Court of Appeals which Petitioner quotes is merely a statement that the Railway Labor Act does not confer jurisdiction upon the Federal Courts of actions for breach of contract. Thus, the Court stated that "the Federal Courts are not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act" and that "Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements." The Court then added that "Appropriate tribunals have been established for that purpose," thereby apparently referring to the Railroad Adjustment Board.

It is clear that the Railway Labor Act does not confer jurisdiction upon the Federal Courts to afford relief for breach of contract. *Gully v. First National Bank,* 299 U.S. 109; *Burke v. Union Pacific Railroad Co.,* (10th

C.C.A.), 129 F.2d 844; *Barnhardt v. Western Maryland Ry. Co.*, (4th C.C.A.), 128 F.2d 709, cert. den. 317 U.S. 671, 87 L.Ed. 538; *Parrish v. Chesapeake & O. Ry. Co.* (4th C.C.A.), 62 F.2d 20, cert. den. 288 U.S. 604; *Malone v. Gardner* (4th C.C.A.), 62 F.2d 15.

It likewise is clear that the Railway Labor Act does confer such jurisdiction upon the Railroad Adjustment Board, 45 U.S. Code, sec. 153; see *Slocum v. D. L. & U. V. R. Co.*, 339 U.S. 239.

The statements to which Petitioner takes exception are clearly correct and do not conflict with any decisions of which we are aware, either by this Court or any other.

II. Upon the Question Whether the Union Was Under a Duty Imposed by the Railway Labor Act to Take Action in Respect to the Railroad's Alleged Discriminatory Practice, the Opinions Below Are in Full Accord with the Decisions of This Court.

As already noted, the question presented by the opinions below is whether the Railway Labor Act imposed upon the Union a duty to take action in respect to the Railroad's alleged discriminatory practice. The courts below held that the Act did not impose such a duty. This holding is in full accord with the decisions of this Court.

In *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, this Court pointed out that the Railway Labor Act contemplates two types of disputes, namely, "disputes over grievances and disputes concerning the making of collective agreements" (325 U.S. at 722). It then held that while the Act vests the statutory collective bargaining agent with "*exclusive* authority to negotiate and to conclude agreements" (325 U.S. at 778; emphasis supplied), it does not vest the agent with such authority in respect

to grievances, and that in order for a railroad union to conclude its members by a settlement of their grievances "authorization by them over and above any authority given by the statute was essential" (325 U.S. 741). In short, the Court held *that the Act does not itself confer authority upon the collective bargaining representative to act for its members in respect to grievances or wrongs suffered by them, but that such authority must be conferred by the affected members.* We need only add that if the Act confers no authority to act, then it obviously imposes no duty to act.

The applicability of the foregoing to the case alleged by the original complaint herein is apparent. When the Union negotiated and executed the collective bargaining contract of June 1, 1942, it was acting in the field of its exclusive statutory authority and was under a statutory duty to refrain from arbitrary exercise of that authority in a manner inimical to the interests of Negro employees. The original complaint asserted no claim of any breach of that duty. Petitioner did not (and obviously could not) claim that the provisions of the written contract were discriminatory, and the claim of a contemporaneous verbal agreement was not asserted until the proposed amended complaint was offered.[9]

If, after execution of the contract of June 1, 1942, the Railroad committed any wrong (statutory or contractual) against Petitioner or any other Negro, then the individual wronged had his remedy against the Railroad either in proceedings under the Railway Labor Act or in the courts,

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[9]As heretofore noted, the opinions below were directed to the sufficiency of the original complaint. See pages 4-5, *supra.*

and was perfectly competent to act for himself.[10] The Railway Labor Act does not deprive an employee of power to act for himself in respect to such matters; it is only in the field of negotiation and execution of collective contracts that the individual cannot act for himself but must rely upon the union in which exclusive authority is vested. In the field of grievances, the Union can act for the individual only pursuant to the individual's authorization. The Act itself confers no authority to act and, by the same token, imposes no duty to act.

If what the Railroad did was not a wrong, then, of course, neither the individuals injured thereby nor the Union would have any legal remedy. As for remedies other than legal remedies, the only course open to the Union would be to threaten or call a strike. We do not understand there to be any contention that the Railway Labor Act imposes a legal duty to take such action.[11]

As heretofore noted, *what the complaint actually charged was discrimination by the Railroad in hiring.* To hold that the Union was under a duty imposed by the Railway Labor Act to take action in respect to such discrimination would be tantamount to holding that a collective bargaining representative (whether under the Railway Labor Act or the National Labor Relations Act) is under a statutory duty to take whatever economic and other action

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[10]We know of no legal or equitable remedies available to the Union which were not available to Petitioner. On the contrary, Petitioner, being the person allegedly wronged, would be the person to whom the law normally would look to institute proceedings.

[11]While the Railway Labor Act imposes no duty to take such action, Negroes, if they are in the majority and choose to avail themselves of Union membership, are in a position to control the Union's policies and to dictate such action on its part. As heretofore noted, the complaint asserted no claim that Negroes were in the minority. See page 2, *supra*.

may be necessary to secure and enforce a contractual provision forbidding discrimination in hiring. No decision of this Court or of any other has ever suggested the existence of such a duty.

The case of *Steele v. Louisville & Nashville R. R. Co.*, 323 U.S. 192, and the other cases upon which Petitioner relies, are in complete accord with what we have said. In the *Steele* case the union there involved had taken affirmative action against Negroes, who constituted a minority of the craft and were excluded from union membership, by executing a discriminatory contract which deprived them of seniority rights and excluded them from employment. This action by the union was taken in the field of its exclusive statutory power and authority in which individuals were deprived of the right to act for themselves, a fact which the Court emphasized in these words:

> "Section 2, Second, requiring carriers to bargain with the representatives so chosen, operates to exclude any other from representing a craft. *Virginian Railway Co. v. System Federation, supra,* 545. The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining" (323 U.S. at 200).

The Court was of the opinion (323 U.S. at 202) that this exclusive statutory power and authority implied some commensurate statutory duty in respect to *minority* interests. But even in this field of exclusive authority, the Court did not go so far as to hold that the union was under a statutory duty to take affirmative action to protect minority

interests; it held only that the union was under a duty to *refrain* from affirmative action *destructive* of minority interests:

> "Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at *least to the extent of not discriminating against them as such in the contracts which it makes as their representative,* the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed" (323 U.S. at 201; emphasis supplied).

The cases of *Tunstall v. Brotherhood of Locomotive Firemen and Engineers,* 323 U.S. 210, and *Graham v. Brotherhood of Locomotive Engineers and Firemen,* 338 U.S. 232, involved substantially the same facts and were based upon the same grounds as the *Steele* case. The rationale of these decisions was summarized in the case last cited as follows:

> "The *Steele* and *Tunstall* cases, supra, arose under circumstances almost indistinguishable from those of the instant case, and the complaints asked the same kind of relief. We held there that, as the exclusive statutory representative of the entire craft under the Railway Labor Act, the Brotherhood could not bargain for the denial of equal employment and promotion opportunities to a part of the craft upon the grounds of race. We pointed out that the statute which grants the majority exclusive representation for collective bargaining purposes, strips minorities within the craft of all power of self-protection, for neither as groups nor as individuals can they enter into bargaining with the employers on their own be-

half. *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342; *J. I. Case Co. v. Labor Board,* 321 U.S. 332; *Medo Photo Supply Corp. v. Labor Board,* 321 U.S. 678. And we held that abuse of its powers by perpetrating discriminatory employment practices based on racial considerations gives rise to a cause of action under federal law which federal courts will entertain and will remedy by injunction" (338 U.S. at 238).

In short, the foregoing cases hold that a railway union, in exercising its exclusive statutory power and authority to negotiate collective bargaining contracts, is under a corresponding statutory duty to refrain from arbitrary action destructive of minority interests. The complaint in the present case asserted no claim of any violation of that duty, and the opinions below are in full accord with the decisions of this Court.

III. Inasmuch as Petitioner's Claim of Discrimination Was Shown by the Affidavits to Be Sham, Judgment Properly Was Entered for Respondents.

For reasons already stated we do not here examine the factual question whether the District Court was correct in concluding from the affidavits before it that Petitioner's claim was sham. It should suffice for present purposes to point out that the Court, having reached that conclusion, acted properly in entering judgment for Respondents. Rule 12(b) of the Federal Rules of Civil Procedure provides that in proceedings on a motion to dismiss for failure to state a claim, where "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Rule 56 provides for

entry of judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

CONCLUSION

The courts below construed the complaint as charging the Union only with inaction and held that in the circumstances of this case the Union was not under any statutory duty to act. After rendering its opinion, the District Court further concluded from the affidavits that Respondents, in any event, had not been guilty of any discrimination against Negroes and that Petitioner's claim was sham and presented no genuine issue of fact; judgment was entered accordingly. We submit that neither the opinions nor the judgment itself present any conflict with any decision of this Court or of any other court, and that the Petition should be denied.

Dated: February 9, 1951.

Respectfully submitted,

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